

1 communication system for the City of Cerritos. Plaintiff had  
2 and has a reasonable expectancy of economic gain from operating  
3 a full 78 channel cable television system and providing cable  
4 television services to the residences and businesses within the  
5 City of Cerritos, California, without competition from  
6 defendants.

7 27. Defendants GTE and GTE Service Corporation have  
8 engaged in conduct with the purpose, intent, and actual effect  
9 of interfering with plaintiff's relationship with its present  
10 and future customers in the City of Cerritos in that defendants  
11 have prevented plaintiff from offering a full 78 channel cable  
12 television service and defendants are presently competing with  
13 plaintiff in the provision of video programming and intend to  
14 compete with plaintiff in the future.

15 28. Defendants knew of the relationship existing between  
16 plaintiff and its present and future customers in the City of  
17 Cerritos and defendants knew that its actions as herein  
18 described would interfere with the plaintiff's reasonable  
19 expectancy of economic gain from these relationships.

20 29. As a proximate result of defendants' conduct,  
21 plaintiff has suffered damages and will suffer damages in the  
22 future in an amount presently unascertained but exceeding the  
23 minimum jurisdictional limit of this court.

24 30. The acts of defendants, as herein described, were  
25 willful and oppressive and malicious. Plaintiff is therefore  
26 entitled to punitive damages.

27 **THIRD CLAIM FOR RELIEF**

28 31. Plaintiffs reallege and incorporate herein by this

1 reference, each and every allegation contained in paragraphs 1  
2 through 30 of this complaint, as though the same were fully set  
3 forth herein.

4 32. On or about June 29, 1993, plaintiff was notified in  
5 writing by GTE that an additional 275 MHz of broadcast capacity  
6 would become available in 1994, no later than July. GTE  
7 offered plaintiff the right of first refusal to use this  
8 capacity upon its availability at a rental rate of \$95,265.00  
9 per month.

10 33. On or about October 18, 1993, plaintiff communicated  
11 to GTE its formal acceptance of GTE's offer to lease all of the  
12 excess bandwidth capacity of the coaxial facilities pursuant to  
13 the terms of the lease agreement as amended. The written  
14 acceptance communicated plaintiff's position that the  
15 \$95,265.00 per month rental figure specified in the offer from  
16 GTE did not represent "the then reasonable market rent for such  
17 bandwidth", and accordingly conditioned the acceptance of the  
18 offer upon the parties agreement to a reasonable market rent.

19 34. An actual controversy has arisen and now exists  
20 between plaintiff and defendants concerning their respective  
21 rights and duties in that plaintiff contends that bandwidth  
22 capacity in the coaxial facilities in excess of 275 MHz has  
23 become available and plaintiff is entitled to use that increase  
24 in capacity at a reasonable market rent, and plaintiff further  
25 contends that the sum of \$95,265.00 per month is a figure  
26 substantially and materially in excess of the reasonable market  
27 rent for the excess bandwidth, whereas defendants dispute these  
28 contentions and contend that plaintiff does not have a valid

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SAN LUIS OBISPO, CALIFORNIA 93401

1 enforceable contractual right to use the excess bandwidth  
2 because plaintiff has refused to agree to lease the excess  
3 bandwidth at a monthly rental of \$95,265.00, which defendants  
4 contend is the reasonable market rent for the excess bandwidth.

5 35. Plaintiff desires a judicial determination of its  
6 rights and duties and a declaration that it has a valid  
7 enforceable contractual right to lease the excess bandwidth at  
8 a reasonable market rent.

9 36. A judicial declaration is necessary and appropriate  
10 at this time under the circumstances in order that plaintiff  
11 may ascertain its rights under the lease agreement as amended.

12 WHEREFORE, plaintiff prays judgment as follows:

13 1. For a declaration that bandwidth capacity in the  
14 coaxial facilities in excess of 275 MHz has become available  
15 and plaintiff is entitled to use that increase in capacity at  
16 a reasonable market rent;

17 2. For damages according to proof;

18 3. For exemplary and punitive damages in an amount  
19 sufficient to deter defendants from engaging in similar  
20 tortious, malicious and oppressive conduct in the future;

21 4. For reasonable attorneys fees;

22 5. For costs of suit herein incurred; and,

23 6. For such other and further relief as justice may  
24 require.

25 SMITH, HELENIUS & HAYES

26  
27 By: 

CARL E. HAYES,  
Attorneys for Plaintiff  
APOLLO CABLEVISION, INC.

PROOF OF SERVICE

I am employed in the County of San Luis Obispo, State of California. I am over the age of 18 years and not a party to the within action; my business address is 1880 Santa Barbara Street, San Luis Obispo, California, 93401.

On January 26, 1995, I served FIRST AMENDED AND SUPPLEMENTAL COMPLAINT on the interested parties in this action by placing a true and correct copy thereof enclosed in a sealed envelope addressed as follows:

Douglas H. Deems, Esq.  
PILLSBURY MADISON & SUTRO  
Attorneys at Law  
725 South Figueroa Street  
Los Angeles, CA 90017

☐ (By Mail) I deposited such envelope in the mail at San Luis Obispo, California. The envelope was mailed with postage thereon fully prepaid.

☒ (By Mail) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at San Luis Obispo, California, in the ordinary course of business.

☐ (By Overnight Delivery) I deposited such envelope in the Federal Express depository at San Luis Obispo, California. The envelope was sent with delivery charges thereon fully prepaid.

☐ (By Personal Service) I caused such envelope to be hand delivered to the offices of the addressee(s) shown above and indicated by an asterisk (\*).

☐ (By Facsimile) I caused each document to be delivered by electronic facsimile to the offices listed above.

☒ (State) I declare, under penalty of perjury, under the laws of the State of California, that the above is true and correct.

☐ (Federal) I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed on January 26, 1995, at San Luis Obispo, California.

Martha Greenlee  
MARTHA J. GREENLEE

A LAW CORPORATION  
RAILROAD SQUARE  
1880 SANTA BARBARA STREET  
THIRD FLOOR  
SAN LUIS OBISPO, CALIFORNIA 93401



UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

GTE CALIFORNIA, INCORPORATED, a  
California corporation,

Plaintiff-Appellant,  
vs.

APOLLO CABLEVISION, INC., a  
California Corporation; CITY OF  
CERRITOS; FEDERAL COMMUNICATIONS  
COMMISSION,

Defendants-Appellees.

No. 94-56377

C.D. California  
No. CV 94-2689 SVW

On Appeal from the United States District Court  
for the Central District of California

APPELLANT'S OPENING BRIEF

PILLSBURY MADISON & SUTRO  
WALTER R. ALLAN  
PATRICK G. ROGAN  
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Attorneys for Appellant

Here, GTECA submits that the traditional bases for primary jurisdiction do not exist. At minimum, if it were to be determined that the FCC should complete its investigation prior to judicial review, then the district court should have stayed the case pending the FCC's review of issues requiring "special expertise."

A. GTECA's complaint did not fall within the FCC's primary jurisdiction.

When filed, GTECA's complaint did not encompass any request to review a FCC order--it sought a determination of the legal effect of a FCC order. Then, after filing the case and after the FCC filed its motion to dismiss or stay, the FCC issued its July 17, 1994 order, discussed supra, pages 10-13. CR 22:26-43. That order identified some, but not all, of the issues raised in GTECA's complaint. Id.

Nonetheless, the fundamental question of the legal effect of the order and related actions remains within the traditional competence of the courts to decide, and therefore the doctrine of primary jurisdiction should not apply. See generally Nader v. Allegheny Airlines, 426 U.S. 290, 305-06 (1976), in which the Supreme Court rejected the application of primary jurisdiction, stating:

Referral of the . . . issue . . . [to the agency] cannot be justified by the interest in informing the court's ultimate decision with "the expert and specialized knowledge" of the [agency]. The action . . . does not turn on a determination of the reasonableness of a challenged practice - a determination that could be facilitated by an informed evaluation of the economics of technology of the regulated industry. The standards to be applied in an action for fraudulent

misrepresentation are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts of this case.

Here, there are no "unique" issues of tariff construction requiring the prior findings of the FCC on the issue. Because the predominant issue in GTECA's complaint is the legal effect of the FCC's assertion of Title II jurisdiction, it does not fall within the special expertise of the FCC to decide. See Marshall v. El Paso Natural Gas Co., 874 F.2d 1373, 1377 (10th Cir. 1989) (holding that the district court is not required to defer factual issues to agency under the doctrine of primary jurisdiction if those factual issues are the sort that the court routinely considers). The district courts are equally, if not more, skilled in deciding such legal issues. Accord Clark Oil Co., Inc. v. Texaco, Inc., 609 F. Supp. 1373, 1382 (Del. 1985). Moreover, the relief sought does not involve the special rule making expertise of the FCC, nor could such relief realistically interfere with the FCC's rule-making authority in the matter presently before it.

B. In any event, the case should not have been dismissed.

Although GTECA does not believe that the fundamental issue presented by its complaint falls within the primary jurisdiction of the FCC, it is apparent that there are some issues identified for investigation and briefing by the FCC that overlap those presented in the instant case, and that





ORIGINAL

## LEASE AGREEMENT

This Lease Agreement is entered into as of the 22nd day of January, 1987, between General Telephone Company of California ("Owner") and Apollo Cablevision, Inc. ("Lessee").

### Recitals

This Lease Agreement is entered into with reference to the following agreed facts:

A. Owner and T. L. Robak, Inc., Lessee's parent corporation, have entered into negotiations for the construction of an underground electrical signal transmission facility (the "System") to be constructed in the City of Cerritos, California. A portion of the System (the "Coaxial Facilities") has been designed to transmit cable television ("CATV") signals to Lessee's customers in the City of Cerritos via coaxial cable.

B. The purpose of this Lease Agreement is to set forth the terms and conditions under which Owner will lease to Lessee the bandwidth required by it to provide CATV service to Lessee's customers in the City of Cerritos.

NOW THEREFORE, the parties hereto do hereby agree as follows:

1. The Coaxial Facilities Capacity. The Owner agrees to lease and the Lessee agrees to rent from the Owner 275 MHz of bandwidth capacity for the use of Lessee in providing CATV service in the City of Cerritos. A description of where the Coaxial Facilities are installed to provide said capacity is shown on

Exhibit "A", attached hereto and by this reference incorporated herein.

Owner reserves the right to select the actual physical facilities used to carry Lessee's broadcast signals and replace or modify said facilities in its sole discretion, provided the bandwidth capacity and quality of transmission provided to Lessee is not impaired.

Lessee was aware, prior to seeking a CATV contract, and remains aware that lease of pole attachment and/or conduit space from Owner, for Lessee's own distribution facilities, at reasonable rates and without undue usage restrictions, was an available alternative to the instant Agreement.

2. Rent. The Lessee shall pay the Owner as rent for the use of said bandwidth capacity the monthly sum described in Exhibit "B", attached hereto and by this reference incorporated herein. A late payment charge equal to 1.5% per month, or the maximum rate allowed by law, whichever is less, will apply to each rental payment which is received by Owner more than five (5) days after the payment due date shown on Owner's monthly statements.

3. Term. This Lease Agreement shall commence as of the date indicated above and shall continue for a period of fifteen (15) years from the date Lessee receives the written notice of the availability of said bandwidth capacity (as set forth in paragraph 16 of that certain Construction Agreement between the Owner and T. L. Robak, Inc., dated the 22nd day of January, 1987, and by this reference incorporated herein), unless sooner terminated by the provisions of this Lease Agreement.

4. Use of Coaxial Facilities Capacity. The bandwidth capacity leased by Lessee hereunder shall be used and operated by Lessee pursuant to and in compliance with the provisions of that certain CATV Contract between Lessee and the City of Cerritos, and by this reference incorporated herein. Lessee's use and operation also shall comply with all applicable federal, state and local laws, rules and ordinances.

5. Option to Renew Lease. Owner hereby grants Lessee an option to renew this Lease coextensive with any extensions granted by the City of Cerritos to Lessee pursuant to the CATV Contract referred to in paragraph 4, at a rent to be agreed between the parties.

6. Title. The parties agree that the title to the System (including the Coaxial Facilities used to provide CATV service) lies exclusively in Owner and the Lessee has no rights or property interest therein other than the rights of a lessee pursuant to the terms of this Lease Agreement. The parties further agree, however, that the items of equipment described on Exhibit "C" which is attached hereto and by this reference incorporated herein, comprise certain elements of the CATV operating system that are owned by Lessee. Owner has no rights or property interest in such specified items.

7. Risk of Loss; Insurance; and Indemnity. The parties agree that all risk of loss or damage to the System (including the Coaxial Facilities) shall be borne by the Owner. The Lessee shall, however, furnish the Owner with general and

public liability insurance in amounts not less than \$2,000,000.00 for any one person, and \$2,000,000.00 per occurrence; property damage liability insurance of not less than \$2,000,000.00; and liability insurance to indemnify and hold Owner harmless from any loss, claim, liability or demand, including attorneys' fees, arising out of Lessee's use of the bandwidth provided by Owner. Lessee shall provide Owner with certificates of said insurance naming Owner as loss payee as its interest may appear as to each of the foregoing insurance policies. The certificates shall further state that Owner shall be given at least thirty (30) days prior written notice of any proposed cancellation of said policies. Lessee shall also maintain workers' compensation insurance covering its employees as required by law for all work performed on the System, including the Coaxial Facilities pursuant to this Agreement. In addition, to the foregoing insurance contract obligations of Lessee, Lessee agrees that it shall indemnify and hold Owner harmless from any and all liability, claims, and demands whatsoever, including attorney's fees, as a result of the negligence or other wrongdoing on the part of any employee, agent, servant or representative of Lessee, in connection with the operation of the Coaxial Facilities.

8. Taxes, Licenses and Franchise Fees. The Lessee shall pay all license fees, taxes, and all other governmental charges, franchise fees, fines, or penalties arising out of Owner's provision of cable bandwidth to Lessee for the provision of CATV services in the City of Cerritos, California, except fines or penalties imposed as a result of Owner's conduct. Upon demand,

the Lessee shall reimburse the Owner for any such taxes, charges, fees, fines or penalties which the Owner may be compelled to pay on Lessee's behalf in connection with this Lease Agreement prior to the termination thereof. The parties further agree to cooperate with one another and furnish each other with any information reasonably required in connection with the parties' obligations under this paragraph.

9. Assignment and Sublease. Subject to the provisions of the CATV Contract between Lessee and the City of Cerritos, and with the approval of Owner (which approval shall not be unreasonably withheld), the Lessee may assign and/or sublease all or any part of its interest under this Lease Agreement; provided, however, such assignments and/or sublease agreements shall not release Lessee from any of its obligations to the Owner hereunder. Subject to the provisions of the Franchise Agreement between Owner and the City of Cerritos, the parties further agree that the Owner may assign all or any part of its right, title and interest in and to the System. In such event, all the provisions of this Lease Agreement for the benefit of the Owner shall inure to the benefit of and may be exercised by or on behalf of the successor in interest of the Owner, and all rental payments due or to become due under this Agreement assigned to such successor in interest shall be paid directly to such successor in interest commencing on the first day of the month following Lessee's receipt of notification of such assignment.

10. Owner's Warranties. As to the cable bandwidth leased hereunder, the Owner warrants that:

(a) It is and will be the sole and absolute Owner of the Facilities used to provide said capacity;

(b) Subject to any necessary regulatory approvals, Owner has the right to lease the same to Lessee;

(c) The same is free of all encumbrances at the time this Lease Agreement commences;

(d) The Owner will keep the Coaxial Facilities used to provide said bandwidth free of all liens, security interests and encumbrances; and

(e) It will do nothing to disturb the Lessee's full right of possession and enjoyment thereof and exercise of all the Lessee's rights with respect thereto as provided by this Agreement.

11. Lessee's Default. Time is of the essence under this Agreement and any of the following events shall constitute default on the part of the Lessee hereunder:

(a) The failure of the Lessee to pay any installment of rental within thirty (30) days after the date on which the same shall become due;

(b) Any breach or failure of the Lessee to observe or perform any of its other obligations hereunder and the continuance of such default for sixty (60) days after notice in writing to Lessee of the existence of such default;

(c) The insolvency or bankruptcy of the Lessee or the making by the Lessee of an assignment for the benefit of creditors, or the consent of the Lessee to the appointment of a Trustee or Receiver, or the appointment without its consent of a

Trustee or Receiver for the Lessee or for a substantial part of its property;

(d) The institution by or against the Lessee of bankruptcy, reorganization, arrangement, or insolvency proceedings; or

(e) The termination of the CATV Contract between Lessee and the City of Cerritos, California.

12. Remedies. Upon the occurrence of any default by Lessee as specified in paragraph 11, the Owner may, at its option:

(a) Declare this Lease Agreement in default and thereupon the cable bandwidth leased to Lessee and all rights of the Lessee therein shall be surrendered to the Owner;

(b) By its agents, take possession of (i) the Coaxial Facilities, (ii) the bandwidth provided pursuant hereto, and (iii) the equipment that is attached to or part of the System, as identified in Exhibit "C" to this Agreement that is owned by Lessee and is used in the transport of the CATV signals. (Any equipment taken shall be subject to all relevant liabilities and, where appropriate, Owner shall compensate Lessee for Lessee's equity interest, if any, in said equipment.) For this purpose Owner may enter upon any premises of the Lessee without liability for suit, action, or other proceeding by the Lessee, so long as no breach of the peace results; or

(c) Subject to its duty to mitigate damages and to any necessary regulatory approvals, Owner may hold, use, sell, lease or otherwise dispose of the Coaxial Facilities and/or bandwidth provided to Lessee at Owner's discretion.



(d) If Lessee breaches this Lease and ceases using the leased cable bandwidth before the end of the Lease term, or if Lessee's right to possession is terminated by Owner because of Lessee's breach of this Lease, this Lease, at the option of Owner, shall terminate. On such termination, Owner may recover from Lessee:

(1) The worth at the time of award of the unpaid rent which had been earned at the time of termination;

(2) The worth at the time of award of the amount by which the unpaid rent which would have been earned after termination until the time of award exceeds the amount of such rental loss Lessee proves could have been reasonably avoided;

(3) The worth at the time of award of the amount by which the unpaid rent for the balance of the term after the time of award exceeds the amount of such rental loss for such period that Lessee proves could be reasonably avoided; and

(4) Any other amount necessary to compensate owner for all the detriment proximately caused by Lessee's failure to perform its obligations under this Lease, or which in the ordinary course of things would be likely to result therefrom.

(e) The "worth at the time of award" of the amount referred to in subparagraphs (1) and (2) of Section (d) hereinabove is computed by allowing interest at the legal rate. The worth at the time of award of the amount referred to in subparagraph (3) of Section (d) is computed by discounting such amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of award plus one percent.

(f) Efforts by Owner to mitigate the damages caused by Lessee's breach of this Lease do not waive Owner's right to recover damages under this article.

(g) Even though Lessee has breached this Lease and has ceased using the leased capacity, this Lease continues in effect so long as Owner does not terminate Lessee's right to possession; and Owner may enforce all its rights and remedies under this Lease, including the right to recover the rent as it becomes due under this Lease.

13. Invalid Provision. Any provision of this Agreement found to be prohibited by law shall be ineffective to the extent of such prohibition without invalidating the rest of this Agreement.

14. Construction. The validity, construction and enforcement of this Agreement shall be governed by the laws of the State of California.

15. Complete Agreement. This Agreement and the exhibits attached hereto contain the entire understanding of the parties, and such understanding may not be modified or terminated except in writing signed by the parties.

16. Waiver of Default; Recovery of Costs of Suit. A waiver of default by Owner shall not be a waiver of any other or subsequent default. In the event either party hereto initiates an appropriate legal action to enforce the terms and provisions of this Lease Agreement, the prevailing party in such action may recover its costs of suit, including reasonable attorneys' fees.

17. Prepayment of Rental. The parties agree that the Lessee may, at any time during the term of this Lease, prepay in whole or in part the "Owner's Recoverable Construction Cost" (as specified on Exhibit "B") at its then present value. If the full unpaid balance is paid, Lessee shall have no further rental payments due under the terms of this Lease Agreement. If less than all of the Owner's Recoverable Construction Cost is prepaid pursuant to this provision, then the subsequent annual rental shall be redetermined pursuant to the formula set forth in Exhibit "B".

18. Testing of New Communications Technologies. Lessee is aware that GTE Service Corporation will be using a portion of the System for the purpose of testing new communications technologies. Lessee further understands that one of the test projects that GTE Service Corporation intends to undertake may involve the transmission of CATV signals over fiber optic cable. Lessee agrees to permit GTE Service Corporation from time to time to use its test bed facilities, including but not limited to fiber optic cable, to carry all or a portion of Lessee's CATV signals, provided Lessee receives adequate assurances from GTE Service Corporation that the CATV service provided by Lessee to its customers will not be disrupted thereby, and further provided that Lessee receives advance notice of any such test activity. Owner agrees to permit Lessee to observe and/or participate in such uses of fiber optic cable in its test bed facilities, provided Owner: (i) receives adequate assurances that such observation and/or participation of Lessee will not disrupt the test bed activities,

and (ii) is not in violation of any agreement between Owner (or any related entity of Owner) and any other party.

19. Assertion of Regulatory Jurisdiction. Lessee understands that the bandwidth capacity subject to this Agreement is provided on a non-common carrier basis, individually negotiated and tailored to meet the particular needs of Lessee and characterized by a long-term Lease with a customer expected to operate a stable business. Therefore, the service by Owner under the Agreement is not subject to regulation by the Public Utilities Commission of the State of California (CPUC) or the Title II authority of the Federal Communications Commission (FCC). If the CPUC should assert jurisdiction or the FCC claim Title II jurisdiction over the service provided by Owner, Lessee shall be subject to the rates, terms and conditions such agency may impose.

20. Express Contingencies. This Agreement is contingent upon the satisfactory completion of the construction of the System by T. L. Robak, Inc., the award of the CATV Contract in the City of Cerritos to Lessee, the award of a franchise agreement in the City of Cerritos to Owner and any necessary regulatory agency approvals.

21. Increase in Bandwidth Capacity. Owner agrees that if bandwidth capacity in excess of 275 MHz should become available, Lessee, or its successor, is hereby granted a right of first refusal to the use of any such increase in capacity at such terms and subject to such provisions as are mutually agreed to by the parties.

22. Repair and Maintenance of the Coaxial Facilities.

If Owner fails to maintain and/or repair the Coaxial Facilities in a manner sufficient to meet the performance standards established by the Franchise Agreement between the City of Cerritos and Owner, then Lessee may undertake such work. All costs incurred by the Lessee shall be billed to the Owner by Lessee. Lessee shall, prior to performing any such work, give Owner reasonable notice of the work required and at least 10 days in which to complete such work; provided, however, that in the event immediate repair is required to restore CATV service or prevent impairment of the required quality of transmission of CATV signals, Lessee may undertake commencement of such work prior to giving such notice. Lessee will, however, provide such notice as soon as is reasonably practicable under the circumstances.

IN WITNESS WHEREOF, this Lease Agreement is executed on the day and year indicated below.

OWNER  
General Telephone Company  
of California

By 

Dated: 1/22/, 1987

Attest:

  
Assistant Secretary

LESSEE  
Apollo Cablevision, Inc.

By Tom Roland

Dated: 1/22, 1987

Attest:

James H. Siskup  
Corporate Secretary



**COPY**

**AMENDMENT NO. 2 TO LEASE AGREEMENT BETWEEN  
APOLLO AND GTEC FOR COAXIAL BANDWIDTH LEASE**

This Agreement is entered into as of the date last appearing on the signature page of this Agreement between GTE California Incorporated, formerly known as General Telephone Company of California ("GTEC" or "Owner") and Apollo Cablevision, Inc. ("Apollo" or "Lessee").

**RECITALS**

This Agreement is entered into with reference to the following agreed facts:

A. Apollo entered into a Lease Agreement with GTEC dated January 22, 1987, which Lease Agreement was modified by the Amendment No. 1 to Lease Agreement dated May 26, 1988 signed by Apollo and GTEC. All references to the "Lease" shall hereinafter refer to the January 22, 1987 Lease Agreement as modified by the May 26, 1988 Amendment thereto. The Lease specifies the terms and conditions under which GTEC, as Owner of an underground electrical signal transmission facility (the "System"), will lease to Apollo as Lessee, bandwidth in the System required by Apollo to provide Video Programming (as that phrase is used in the Cable Communications Policy Act of 1984) to Apollo's customers in the City of Cerritos, California ("City").

B. Apollo has entered into contractual arrangements to acquire decoders ("converter boxes"), which decoders are



suitable for Apollo's current Video Programming, as defined at Recital paragraph F. Apollo has installed, or has in inventory, approximately 3,000 decoders as of the date of this Agreement.

C. GTEC has approved the head end design as prepared by T. L. Robak, Inc., Apollo's parent company, in accordance with a design agreement between GTEC and T. L. Robak. The design specified encoders, computer, and decoders manufactured and provided by Scientific Atlanta, which met the criteria known at the time.

D. GTEC has entered into a separate agreement with GTE Service Corporation ("GTESC") to lease bandwidth in the System to GTESC for testing technology and services in the City. It was understood by all parties at the time of initial leasing that GTESC would be seeking to develop services useful to Apollo and the City. GTESC has determined that the decoders purchased by Apollo do not have the capabilities desired by GTESC, which is attempting to develop new services for Apollo and the City. GTESC has requested GTEC to provide additional System capabilities that necessitate the replacement of the existing decoders, encoder and computer presently installed in the System. The parties agree that this will require Apollo's current installed supply and inventory of decoders to be eliminated and will require